81-1805

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

WILLIAM M. GIBBONS, Trustee Of The Chicago, Rock Island & Pacific Railroad Company; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, As Indenture Trustee; FIRST NATIONAL BANK OF CHICAGO, As Indenture Trustee; HENRY CROWN, *et al.*; UNITED STATES OF AMERICA, and The INTERSTATE COMMERCE COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

In the opinion of petitioner Railway Labor Executives' Association (RLEA),* the following questions are presented by this petition:

1. Does a railroad reorganization court have the discretion to refuse to comply with the clear and unambiguous mandate of Section 17(a) of the Milwaukee Railroad Restructuring Act that a fair arrangement be imposed whenever that court authorizes any abandonment of the rail lines of a railroad in reorganization?

2. Do either the Due Process or Just Compensation Clauses of the Fifth Amendment prohibit Congress from requiring an unreorganizable railroad to aid its employees bear the economic hardships caused by the withdrawal of that debtor's assets from railroad operations?

3. Does the fact that a reorganization court both has presided over the unsuccessful efforts to reorganize a railroad debtor and has ordered that debtor to be liquidated justify that court's refusal to conduct an evidentiary hearing under 11 U.S.C. § 1170 when a party challenges the Trustee's request to abandon the entire railroad system?

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* Petitioner Railway Labor Executives' Association (RLEA) is a voluntary, unincorporated association of the Chief Executive Officers of virtually all of the standard labor organizations which represent railroad employees. RLEA's member organizations are listed in Appendix F to this petition at 61a. While many parties have appeared before the reorganization court during the reorganization proceeding, not all have expressed an interest in the issues raised by this petition. RLEA has listed as respondents herein only those parties who have participated in the appeal from which this Writ of Certiorari is being sought.

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RAILWAY LABOR EXECUTIVES' ASSOCIATION,
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WILLIAM M. GIBBONS, Trustee Of The Chicago, Rock Island & Pacific Railroad Company; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, As Indenture Trustee; FIRST NATIONAL BANK OF CHICAGO, As Indenture Trustee; HENRY CROWN, *et al.*; UNITED STATES OF AMERICA, and The INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Railway Labor Executives' Association [hereinafter, "RLEA"] respectfully requests pursuant to 28 U.S.C. § 1254(1) that this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review and to reverse the Judgment of that court which was entered on October 13, 1981, affirming an order of the United States District Court for the Northern District of Illinois authorizing

the abandonment of the Chicago, Rock Island and Pacific Railroad Company [hereinafter, "CRI" or "Rock Island"] without conducting an evidentiary hearing and without imposing an arrangement to protect employees as required by Section 17(a) of the Milwaukee Railroad Restructuring Act [hereinafter, "MRRA"], 45 U.S.C. §915(a).

OPINIONS BELOW

Except for the report by the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] recommending the abandonment at issue, all of the decisions in this case are not officially reported. The unpublished order of the court of appeals [1] which was entered on October 13, 1981, is reproduced herein as Appendix A. Minor technical corrections were made to that order by a subsequent per curiam order which was issued *sua sponte* on October 22, 1981, and which is reproduced herein as Appendix A-1 at 17a. On December 10, 1981, the court of appeals denied RLEA's petition for rehearing; that order is reproduced as Appendix D at 55a.

The unpublished order of the District Court which was affirmed by the appellate court was dated June 2, 1980, and is reproduced herein as Appendix B-1 at 19a. The District Court orally stated its reasons for that order, and the transcript of its oral comments is

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[1] Rule 35(b)(2)(iv) of the Circuit Rules of the Seventh Circuit provides that an unpublished order:

> Except to support a claim of *res judicata*, collateral estoppel or law of the case, shall not be cited or used as precedent (a) in any federal court within the circuit in any written document or in oral argument; or (b) by such court for any purpose.

reproduced as Appendix B-2 at 23a. That decision was made after the ICC had submitted a report under Section 17(a) of the MRRA, served May 27, 1980, which is reported at 363 I.C.C. 150 (1980); relevant portions of that report are reproduced herein as Appendix B-3 at 33a. Appendix B-4 at 51a is a reproduction of an unreported ICC decision denying as moot RLEA's request for the ICC to reconsider its remarks on employee protection in Appendix B-3.

JURISDICTION

The unpublished order (Appendix A) and its accompanying judgment (Appendix C at 53a) by the court of appeals, which RLEA is asking this Court to review, were entered on October 13, 1981. RLEA filed a timely petition for rehearing and a suggestion for rehearing *en banc* on November 10, 1981; the petition for rehearing was denied on December 10, 1981. Appendix D at 55a. On March 4, 1982, and then on March 17, 1982, petitioner was granted extensions to and including March 30, 1982, in which to file this petition. *RLEA* v. *Gibbons,* Sup. Ct. No. A-761. This petition has been filed within that extended time and within one hundred and fifty (150) days of the date of the court of appeals' denial of the petition for rehearing. 28 U.S.C. § 2101 (c). Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the construction of the employee protective provision of Section 17(a) of the MRRA, 45 U.S.C. § 915(a), as well as the proper interpretation to be given to the hearing requirements in Section 1170 of the Bankruptcy Code, 11 U.S.C. § 1170. Both

Section 17 of the MRRA and 11 U.S.C. § 1170 are reproduced in Appendix E at 57a. The Due Process and Just Compensation Clauses of the Fifth Amendment of the Constitution of the United States [2] will be involved in this case if this Court concludes that Section 17(a) of the MRRA makes the imposition of employee protection mandatory in *any* abandonment proceeding.

STATEMENT OF THE CASE

After operating at a loss for at least eight (8) years, the Rock Island on March 17, 1975, sought the aid of Section 77 of the Bankruptcy Act, 11 U.S.C. § 205,[3] and filed a petition with the United States District Court for the Northern District of Illinois to reorganize under the provisions of that statute. At the time it filed that petition, the Rock Island was one of the largest railroads in this country, operating in thirteen (13) states over more than 10,000 miles of track and employing approximately 10,000 employees. *See,* Appendix B-3 at 37a-38a. It was, as the ICC recognized in 1974, an important segment of this nation's continental transportation system. ***E.g., Chicago & North Western Ry.—Control—Chicago, Rock Island & Pac. R.,*** 347 I.C.C. 556, 595 (1974).

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[2] Relevant portions of the Fifth Amendment provide as follows: "[N]or [shall any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

[3] The Bankruptcy Act, including Section 77, 11 U.S.C. § 205, has been repealed by the Bankruptcy Reform Act of 1978, Pub.L. No. 95-598, 92 Stat. 2549. That appeal, however, is not effective for cases, such as the proceeding at bar, which were pending under the Bankruptcy Act when the Reform Act was enacted. Section 403(a), 92 Stat. 2683.

Shortly after the petition to reorganize was filed, respondent William M. Gibbons was appointed as Trustee of the Rock Island's properties, and he continued to operate that railroad. Although the carrier's cash position was temporarily improved by the Trustee's ability under Section 77 to defer interest and principal payments, the Rock Island continued to experience operating losses (*e.g.*, $38.5 million in 1977) as well as a steady erosion of its traffic base. *See, Chicago, Rock Island & Pac. R. (William M. Gibbons, Trustee)--Abandonment*, 363 I.C.C. 150, 175-77 (1980). This rapidly deteriorating financial position was exacerbated by the severe winter of 1978-79 which sharply increased the Rock Island's operating losses and substantially damaged its physical plant (*Id.* at 177-81), and thus, by the summer of 1979, both the creditors and the shareholders of the debtor were demanding its liquidation.

As August 1979 came to a close, first one and then another of Rock Island's labor organizations struck that railroad after those unions had exhausted the procedures of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, in unsuccessful attempts to resolve major disputes with the Trustee. Once the labor organizations went on strike, the Trustee "locked-out" his contract employees and attempted to operate a truncated system using non-union personnel. Because of the impact which the Rock Island's curtailed operations had on the rail transportation system, the President, on September 20, 1979, invoked the status quo provisions of Section 10 of the Railway Labor Act, 45 U.S.C. § 160, by creating an Emergency Board under that Section. *Executive Order No. 12,159*, 44 Fed. Reg. 54687 (September 21, 1979).

When it became apparent that the Trustee lacked the cash to resume operations, the ICC exercised its powers under 49 U.S.C. § 11125 on September 26, 1979, and directed the Kansas City Terminal Railway Company [hereinafter, "KCT"] to operate "virtually all" of the Rock Island's rail lines. *Directed Service Order No. 1398,* 360 I.C.C. 289, 290-92 (1979). On that same day, the reorganization court denied the oral application of the Trustee to continue operating the Rock Island system. Directed Service operations by the KCT began October 5, 1979, and continued until March 1980. In March, other rail carriers assumed the obligation to operate portions of the Rock Island, first under uncompensated directed service orders pursuant to 49 U.S.C. § 11125, and then under interim authorities granted pursuant to Section 122 of the Rock Island Transition and Employee Assistance Act [hereinafter, "RITA"], 45 U.S.C. § 1017, after the enactment of that Act on May 30, 1980. While a substantial portion of the Rock Island is not operated today, portions have been sold for continued rail usage,[4] and other portions are being operated under temporary authorities issued pursuant to Section 122 of RITA. *See, Service Order No. 1473,* 33rd Revision, served February 18, 1982.

Several months after the KCT began its directed service operations over the Rock Island, the Trustee

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[4] In his status report on the liquidation process for the period ending December 31, 1981, the Trustee reported that only 133 miles of track (excluding the 1,027.3 miles involved in appeals Nos. 80-2199 and 80-2286) had been sold as of December 31, 1981. An additional 403 miles were the subjects of signed but unconsummated sale agreements.

filed a plan of reorganization on December 28, 1979.[5] By Order No. 221, issued January 9, 1980, the reorganization court gave all interested parties until January 28, 1980, in which to file comments which the court would then transmit together with the Trustee's plan to the ICC for consideration under Section 77(d) of the Bankruptcy Act, 11 U.S.C. § 205(d). However, before the comment date had passed, the court received a report on January 21, 1980, from an independent consultant firm which concluded that the Trustee's proposed reorganization was not viable. On January 25, 1980, the court found that the consultant's study was "a good study" and that the court was "compelled . . . if logic prevails, to accept the conclusion that the plan of reorganization proposed by the Trustee has no hope of success." *RLEA* v. *Gibbons* [hereinafter, *"Liquidation Petition"*], Sup. Ct. No. 80-1899, Appendix C at 21a, *cert. denied*, October 5, 1981. The court then refused to transmit the plan to the ICC as Bankruptcy Rule 8-303 required, and instead instructed the Trustee "to commence preparation of [a] preliminary plan for liquidation" of the debtor. *Liquidation Petition,* Appendix B at 18a. RLEA noted an appeal from that order, but on February 11, 1981, the Seventh Circuit affirmed in an unpublished per curiam opinion. *Liquidation Petition,* Appendix A. This Court subsequently denied RLEA's petition for a writ of certiorari. *RLEA* v. *Gibbons,* Sup. Ct. No. 80-1899, *cert. denied,* October 5, 1981.

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[5] The Trustee's plan called for a "core" type of operation by which the reorganized system would operate much less than one-half of the CRI system, basically in the northeastern portion of its system.

A. The Abandonment Order

On April 14, 1980, the reorganization court directed the Trustee to file an application with the ICC under Section 17 of the MRRA "for its report confirming the abandonment of the Rock Island's total railroad system subject to sale of portions of such system to other entities for their operation thereof . . . ." Order No. 232, dated April 14, 1980, at 1-2. That order also instructed the ICC to file its report with the court thirty (30) days after the Trustee filed his application, and set comment and hearing dates for further action on the Trustee's abandonment motion. The Trustee filed his application with the ICC on April 24, 1980, and the ICC accepted that application over RLEA's objections that the application lacked necessary financial information. Appendix B-3 at 36a. On May 27, 1980, the ICC served its report and stated:

> We conclude that abandonment of the Rock Island and its dissolution as an operating railroad is [*sic*] required by the public convenience and necessity. We have reviewed the carrier's present financial position and future prospects and conclude that it has no realistic hope for reorganization or continued public service in its present form. The extremely deteriorated condition of its plant and severe erosion of its traffic base (through interrupted and uncertain operations) make it clear that the Rock Island will not be able to recover. Consequently, fairness to its creditors and stockholders dictates that the carrier be liquidated. Nevertheless, the communities and shippers served by the Rock Island have also shown that many of its services are essential and can be profitable. We recommend to the court that, in permitting abandonment, it take steps to insure that the service over the viable portions of the Rock Island

> is not interrupted and that these portions are sold as operating lines. . . .

Appendix B-3 at 34a-35a. The Commission also commented upon the Court's obligation under Section 17(a) of the MRRA to provide a fair arrangement to protect employees. After observing that the *New York Dock* conditions[6] are "apparently mandated by Section 17(a) of the MRRA" (Appendix B-3 at 45a), the ICC went on to note the "options" which it believed the court had in this area. According to the ICC: "The *New York Dock* conditions can be imposed on the Rock Island. However, another viable option is not to impose any form of labor protection."[7]

RLEA filed its comments on May 30, 1982, and asserted that *inter alia* Section 17(a) of the MRRA and 11 U.S.C. § 1170(c) required the reorganization court to conduct an evidentiary hearing at which the trustee would have the burden of establishing that the abandonment of the entire Rock Island system satisfied the test established by 11 U.S.C. § 1170(a).[8] RLEA

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[6] Those employee protective provisions promulgated in *New York Dock Ry.—Control*, 360 I.C.C. 60 (1979), *aff'd sub nom., New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979).

[7] RLEA asked the ICC to reconsider that advice, but on December 15, 1980, the ICC served a decision which dismissed that request as moot because the ICC viewed Section 106 of RITA, as amended, as "effectively pre-empt[ing] labor protection to Rock Island employees resulting from the abandonment . . . ." Appendix B-4 at 52a.

[8] RLEA asserted that an evidentiary hearing was necessary: (1) to examine whether the Rock Island was "ll "cashless" and would continue to remain so even after selling assets; (2) to determine whether the carrier could operate essential rail services in a reduced system; and (3) to determine the impact of the proposed abandonment on employees.

also asserted that if the court approved the abandonment application in whole or in part, it was required by Section 17(a) of the MRRA "to provide a fair arrangement at least as protective of the interests of employees as that required under . . . [49 U.S.C. § 11347]." 45 U.S.C. § 915(a). At the hearing on June 2, 1980, the reorganization court rejected both arguments and issued Order No. 248 which "confirmed and decree the "total systems abandonment of Rock Island's lines and the discontinuance of all of its rail services and obligations as a common carrier . . . ."[9] Appendix B-1 at 21a. Order No. 248 further provided that "no claim or arrangement of any kind or nature for employee labor protection payable out of the assets of the Debtor's estate is allowed or required by this Court pursuant to Section 17" of the MRRA. *Id.*

RLEA's assertion that Section 17(a) of the MRRA and Section 1170(c) of the Bankruptcy Code required an evidentiary hearing was rejected by the reorganization court because it concluded that in the course of presiding over the Rock Island's reorganization it had been "holding hearings on the subject of abandonment of the Rock Island for five years." Appendix B-2 at 27a. Because of its extensive participation in the Rock Island's attempts to survive, the court concluded that the prior court proceedings were "all the hearings I have to have or need to have on the subject of the need and desirability of an order to discontinue operations." *Id.*

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[9] Those CRI rail lines listed in Appendix D to the ICC report were exempted from that abandonment authority for a period which was extended once, but which expired on March 31, 1981. *See*, Appendix A at 9a n.4.

When it addressed the merits of the Trustee's and the creditors' joint request for an abandonment order, the court noted that: "Abandonment is really only a technical recognition in this case of what I might have previously ordered and what has actually happened." Appendix B-2 at 27a. According to the reorganization court, the debtor was a "bankrupt business" whose private creditors could no longer be required to support forever its operations at a loss. *Id.* at 24a. It was that finding which had led the court to conclude that "continued operation of the Rock Island has passed that point where it is mandated by the public interest and is such a serious financial disservice to the creditors that it was terminated and had to be terminated." *Id.* at 25a. And it was that conclusion which led the court to find in its order at bar that the "Rock Island's unconditional discontinuance of service and its total system abandonment is constitutionally mandated . . . ." Appendix B-1 at 20a. This Court's decision in *Brooks-Scanlon Co.* v. *Railroad Commission,* 251 U.S. 396 (1920), was cited as support. *Id.*

Even though Section 17(a) of the MRRA provided that in "authorizing *any* abandonment pursuant to this section, the court *shall require* the carrier to provide a fair arrangement [to protect employees]" (45 U.S.C. § 915(a) (emphasis added)), the reorganization court concluded that Section 17(a) did not "control the situation" it faced. Appendix B-2 at 27a. The court reached that conclusion because it believed that: "Section 17 . . . and its labor protection provisions contemplate less than entire system abandonment in imposing labor protection obligations . . . ." *Id.* In its order authorizing the abandonment, the court stated as follows in further explaining its decision to dis-

regard the congressional mandate in Section 17(a) that employee protection be provided:

> . . . Rock Island's systemwide termination of operations and total line abandonment . . . do not warrant further consumption of Rock Island's assets for protection payments to employees whose jobs with Rock Island are no longer in existence by reason of such total abandonment and operational discontinuance. . . . and, that consistent with ICC precedent, with the Rock Island's constitutional right to abandon its lines and discontinue its service, and with the equities of the Rock Island situation, no labor protection arrangements may be imposed on the Rock Island estate . . . .

Appendix B-1 at 20a-21a. RLEA noted an appeal from that order on June 9, 1980.[10]

B. The Court of Appeals' Decision

Although the reorganization court had relied upon constitutional principles in concluding both that the estate had an immediate and unconditional right to abandon and that the assets of the debtor could not be used to aid Rock Island employees, the Seventh Circuit did not address those constitutional issues in affirming the abandonment order. Rather, the court of appeals relied upon its construction of Section 1170

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[10] After the reorganization court refused on June 2, 1980, to stay the abandonment as required by 11 U.S.C. § 1170(d)(1), RLEA asked the Seventh Circuit on June 9, 1980, to enforce 11 U.S.C. § 1170(d)(1). That request was denied. On July 7, 1980, appellant asked the court to reconsider its ruling, but on September 18, 1980, that request also was denied.

of the Bankruptcy Code and of Section 17(a) of the MRRA to affirm.[11]

RLEA had argued to the appellate court that Section 1170 of the Bankruptcy Code, which was made applicable to this case by Section 17(a) of the MRRA, required the reorganization court to conduct an evidentiary hearing before it authorized any abandonment. Indeed, the requirement for a pre-abandonment hearing appears in both subsections (a) and (c) of Section 1170. Nevertheless, relying upon Section 102 (1)(A) of the Bankruptcy Code, 11 U.S.C. § 102(1)(A), the court of appeals concluded that the "particular circumstances" of each case must be considered in determining whether an "adequate evidentiary hearing" was provided. Appendix A at 4a. Observing that the CRI reorganization court "had been totally im-

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[11] The court of appeals also dismissed as moot two (2) appeals which RLEA had taken from orders of the reorganization court authorizing the sale of Rock Island lines to two (2) existing carriers, but refusing to impose arrangements to protect Rock Island employees. RLEA argued in one of those appeals (*i.e.*, No. 80-2286) that the court did not have the right to disregard the ICC's order authorizing that sale under 49 U.S.C. § 11343, which approved the sale on the condition that the estate provide a fair arrangement to protect CRI employees. In the other appeal (*i.e.*, No. 80-2199), RLEA asserted that Section 17(b)(1) of the MRRA, 45 U.S.C. § 915(b)(1), required the protection of both CRI employees and the purchasing carrier's employees who were not covered by what is known as the March 4 Hiring Agreement. The court of appeals dismissed those appeals as being moot because, relying upon Bankruptcy Rule 8-703(a)(6), it concluded that since the sale orders were not stayed, an appeal could not change the terms of the completed sales. While RLEA submits that its appeals were not moot (*see, County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979)), it is not presenting that issue with this petition.

mersed in the Rock Island's affairs since March 17, 1975" (*Id.*), the appellate court found that the reorganization court did not abuse its discretion "in concluding that, under the particular circumstances before it, an additional evidentiary hearing was not required." *Id.* at 5a.

The reorganization court's refusal to hold a hearing was also justified, the court of appeals opined, because RLEA "was seeking an evidentiary hearing to determine essentially whether the Rock Island was reorganizable—a question that had been previously decided in the negative by the reorganization court in its January 25, 1980, liquidation order." Appendix A at 5a. Since liquidation could not proceed without abandonment authority, the abandonment order simply "fulfilled an important procedural requirement" to effectuate "substantive decisions that had already been made." *Id.* Thus, "a further evidentiary hearing would . . . have served no useful purpose." *Id.*

When it addressed RLEA's assertion that Section 17(a) of the MRRA required the reorganization court to provide a fair arrangement to protect Rock Island employees, the court of appeals noted that "RLEA's position is certainly reflected in the language of the statute." Appendix A at 10a. "But," the court continued, "it is contrary to what seems so clearly to be the intent of Congress in enacting § 17a [sic]." *Id.* Relying upon a statement in the Conference Report to the MRRA, the court concluded that the language used by Congress in Section 17(a) of the MRRA must be interpreted in light of Congress' intent "to make no change in existing law as it affects employee protection." H. Rpt. No. 96-583, 96th Cong., 1st Sess. at

27 (1979). To determine what that "existing law" was, the court reviewed ICC practice, primarily as it existed prior to 1976 when Congress made employee protection mandatory in abandonment cases (*see,* Section 802, Pub. L. No. 94-210, 90 Stat. 31, 127),[12] and it found that "existing law regarding labor protection includes the long established I.C.C. practice of denying labor protection in total abandonments." Appendix A at 10a. Thus, the appellate court concluded, the reorganization court "properly declined to provide labor protection in connection with the total abandonment of the Rock Island." *Id.* at 13a.

RLEA was granted to November 10, 1981, in which to petition for rehearing, and on that day it filed a suggestion that the Seventh Circuit rehear the appeals *en banc* and a request that the panel reconsider the employee protection and mootness issues. On December 10, 1981, the court issued an order denying RLEA's petition for rehearing. Appendix D at 55a.[13]

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[12] In its review of prior ICC practice, the court of appeals incorrectly assumed that the pre-1976 ICC practice was developed under a statute which made employee protection mandatory in abandonment cases. *See,* Appendix A at 10a-11a. This misconception is evident from the court's citation (*Id.* at 11a) of the 1976 Conference Report as being the conference report to the 1978 recodification statute—Pub. L. No. 95-473, 92 Stat. 1337 (1978).

[13] On August 4, 1980, the United States noted an appeal from Order No. 248 of the reorganization court; that appeal was docketed as 7th Cir. No. 80-2075, and has been held in abeyance pending the outcome of this Court's consideration of *Railway Labor Executives' Assoc.* v. *Gibbons,* Sup. Ct. Nos. 80-415 and 80-1239, decided March 2, 1982. On March 19, 1982, the government moved to dismiss its appeal.

REASONS FOR GRANTING THE WRIT

I. This Case Presents Important Questions Of Federal Law, Including Recurring Constitutional Issues, Which Must Be Addressed By This Court To Remove Unwarranted Obstacles Which The Lower Courts Have Placed Upon Congress' Regulation Of Railroad Reorganizations

It is axiomatic that the Constitution of the United States gives Congress and not the federal courts the power to regulate interstate and foreign commerce and to establish uniform laws on the subject of bankruptcies. U.S. Const. art. 1, § 8, cls. 3, 4. If that separation of powers is to retain its validity, federal courts must not hinder the legitimate regulation of commerce or expand the scope of bankruptcy laws under the guise of either statutory construction or the protection of general, undefined constitutional rights. Moreover, it is but a corollary of the separation of powers doctrine that this Court has an obligation to review actions of the federal judiciary which, as in the case at bar, place unwarranted obstacles upon Congress' efforts to exercise its constitutional powers under the Commerce and Bankruptcy Clauses. Petitioner RLEA respectfully submits that this case, as well as that presented in *Railway Labor Executives' Assoc.* v. *Scott* [hereinafter, "*Susquehanna*"], Sup. Ct. No. 81-1715, present situations in which review by this Court is necessary to enable Congress to exercise effectively its powers under both the Commerce and Bankruptcy Clauses.

When it passed Sections 5(a) and 17(a) of the MRRA in November 1979, Congress transferred to Section 77 railroad reorganizaton courts the powers to regulate the abandonment of bankrupt railroad lines which had been delegated previously to the Interstate

Commerce Commission. But, consistent with its long-standing policy of requiring railroads to protect the interests of employees,[14] Congress qualified the abandonment authority it was delegating to the Section 77 courts by providing that: "In authorizing *any abandonment pursuant to this section, the court shall require* the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under . . . [49 U.S.C. § 11347]." 45 U.S.C. § 915 (a) (emphasis added). As this Court has long recognized, such employee protections serve a strong public interest in guaranteeing the "stability of the labor supply available to the railroads . . . ." *ICC* v. *Railway Labor Executives' Assoc.*, 315 U.S. 373, 377 (1942). Moreover, such protection obligations may be imposed upon even a railroad in reorganization without affronting the Due Process guarantees of creditors and investors. *United States* v. *Lowden, supra* note 14, 308 U.S. at 240.

Congress obviously relied upon those past decisions of this Court in devising the means it would use in the MRRA to protect both the public and debtor-creditor interests in railroad reorganizations. And as shown by its actions in authorizing the Milwaukee Railroad Trustee to enter into an alternative employee protection program (*i.e.*, Sections 9 and 15, MRRA, 45 U.S.C. §§ 908, 914), Congress considered adequate employee protection to be important to the preservation of essential rail services. Moreover, as Congress' actions in twice enacting the employee protective programs of RITA show (*i.e.*, Section 106, 45 U.S.C.

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[14] *E.g., United States* v. *Lowden*, 308 U.S. 225 (1939); Section 7, Emergency Railroad Transportation Act of 1933, 48 Stat. 211, 213-14; 49 U.S.C. §§ 10903(b)(2), 11347.

§ 1005), Congress has concluded that the protection of employees affected by the demise of the Rock Island is essential to the preservation of rail service in the CRI service area. Sections 102(1) and (2) of RITA, 45 U.S.C. §§ 1001(1), (2); H.Rpt. No. 96-1041, 96th Cong., 2d Sess. at 26 (1980).

Besides intending to assure an adequate supply of railroad employees, Congress has required the imposition of employee protective provisions in railroad reorganizations to serve another purpose as well—*i.e.*, to discourage railroad liquidations. As Congress explained in its Conference Report to the Staggers Rail Act of 1980 [hereinafter, "SRA"], Pub.L. No. 96-448, 94 Stat. 1895:

> The conferees reiterate that it is the intention of Congress that employee protection be imposed in bankruptcy proceedings involving major rail carriers, for to do otherwise would be to promote liquidations, to the detriment of the employees and the public interest.

H. Rpt. No. 96-1430, 96th Cong., 2d Sess. at 138-39 (1980).

Congress, petitioner RLEA submits, clearly has the right under its Bankruptcy Clause powers to limit the ability of railroads to liquidate under the Bankruptcy laws it enacts. Indeed, prior to 1933, railroads were "excluded from the operation of the bankruptcy law." H.Rpt. No. 1897, 72nd Cong., 2d Sess. at 5 (1933). And when Congress passed Section 77 of the Bankruptcy Act of 1933, 47 Stat. 1467, 1474 (1933), it did not give the full benefit of those laws to railroads. *See,* Section 4 of the Bankruptcy Act, 11 U.S.C. § 22. As this Court explained in *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pac. Ry.*, 294 U.S.

648, 676 (1935) (emphasis added): "[A] proceeding under § 77 is not an ordinary proceeding in bankruptcy. It is a special proceeding *which seeks only to bring about a reorganization,* if a satisfactory plan to that end can be devised." Thus, Congress' approach to the financial plight of railroads has been to encourage "continued rail service through railroad reorganizations rather than liquidations . . . ." 126 Cong. Rec. H8619, col. 2 (September 9, 1980). Its use of employee protection requirements to aid in fostering that goal is clearly consistent with that purpose, and is an integral part of both the MRRA modifications to Section 77's and the Bankruptcy Code's railroad reorganization provisions,[15] as modified by Section 227 of the SRA, 94 Stat. 1931.

Unfortunately, the decisions below, by themselves and especially when taken together with those in the *Susquehanna* case, have effectively undermined the statutory scheme which Congress has so carefully woven to regulate railroad reorganizations. Not only have thousands of Rock Island employees been denied the needed protections which Congress has decreed are required by the public interest, but it is clear that as the law now stands, no employee protection will be imposed by a reorganization court or by the ICC in any subsequent entire line abandonment case under the MRRA, the Bankruptcy Code, or the Interstate Commerce Act. *See, In re Auto-Train Corp.,* 11 B.R. 418 (Bk.Ct. D.C. 1981), *vacated,* D.D.C. No. 81-1721, decided October 28, 1981. Moreover, the lack of an

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[15] 11 U.S.C. §§ 1161-1174. Section 1174 of the Code now authorizes the liquidation of a debtor railroad; that provision in the Code, Congress has stated, was a change from existing law under Section 77. S.Rpt. No. 95-989 at 12 (1978).

employee protection obligation in an entire line abandonment case will encourage liquidations of failing railroads rather than their restructuring because liquidations have now become the less expensive alternative.[16]

It is no answer to the dilemma posed for Congress and employees by this case and by the *Susquehanna* decisions to assert that Congress can enact new legislation if it considers this issue to be important. Congress' ability to legislate effectively in this area is now questionable, for the *Susquehanna* case and the decision by the CRI reorganization court have concluded that the Constitution (presumably, the Due Process and Just Compensation Clauses of the Fifth Amendment) prohibits Congress from requiring a liquidating railroad to use any of its "assets for protection payments to employees whose jobs with [the debtor] . . . are no longer in existence by reason of such total abandonment and operational discontinuance." Appendix B-1 at 20a. These constitutional questions, as RLEA explained in its petition to this Court in the *Susquehanna* case (Sup.Ct. No. 81-1715, Pet. at 20-24), have been posed recently by other courts and have been argued to this Court, but have not been answered directly by this Court. Consequently, Congress cannot be assured that the federal courts will enforce whatever regulations it might enact to regulate

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[16] Congress' fear that the lack of an employee protection obligation in major line systemwide abandonments will encourage liquidations is not mere conjecture. The unsecured creditors and the debtor in the Milwaukee Railroad Reorganization proceeding already see the liquidation of that railroad as a desirable goal and have opposed further borrowings which are needed to aid it reorganize. The decisions at bar only serve to encourage their efforts to liquidate rather than to reorganize.

railroad reorganizations. Moreover, as this case and the fate of the employee protective program of RITA [17] clearly show, Congress' purpose in requiring employee protection will be frustrated if its commands are not enforced when the need for those protections arises. RLEA respectfully submits that this area is too important to be left in such a state of great uncertainty.

II. By Disregarding The Clear And Unambiguous Command In Section 17(a) Of The MRRA That Employees Be Protected Whenever a Section 77 Reorganization Court Authorizes An Abandonment, The Lower Courts Have Decided An Important Question Of Federal Law In A Manner Which Conflicts With Applicable Decisions Of This Court

This Court has frequently admonished federal courts that the "starting point" in the construction of a statute is "the language employed by Congress." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979). If that language is clear and unambiguous, the search for the intent of Congress is complete, for there is, "of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States* v. *American Trucking Assoc., Inc.*, 310 U.S. 534, 543 (1940). In this case, however, the lower courts have ignored both those admonitions and the plain meaning of Section 17(a) to legislate an exception to the unambiguous command in that Section that: *"In authorizing any abandonment pursuant to this section, the court shall*

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[17] This Court has recently concluded that the employee protective program of RITA was repugnant to the Constitution as being a non-uniform law of bankruptcy. *Railway Labor Executives' Assoc.* v. *Gibbons*, Sup.Ct. Nos. 80-415, 80-1239, decided March 2, 1982.

require the carrier to provide a fair arrangement" to protect employee interests. 45 U.S.C. § 915(a) (emphasis added). Unfortunately, by judicially legislating an exception to the all-inclusive mandatory language of Section 17(a) for entire line abandonments, the court of appeals has thwarted Congress' legitimate exercise of its Commerce and Bankruptcy Clause powers.

When Congress enacted the employee protection requirements in Section 17(a) of the MRRA, it used words which clearly and unambiguously stated that the requirement was mandatory and applied to the authorization of "any abandonment pursuant" to that section. Indeed, by stating that RLEA's position on employee protection was "certainly reflected in the language of the statute" (Appendix A at 10a), the court of appeals implicitly acknowledged that the statute was clear and unambiguous. Federal courts have been instructed to stop searching for the meaning of a statute at that point, for this Court has "historically assumed that Congress intended what it enacted." *United States Railroad Retirement Board* v. *Fritz,* 449 U.S. 166, 179 (1980). Nevertheless, without even acknowledging the limitations upon its jurisdiction to modify a statute by statutory construction, the court of appeals interpreted that mandatory language as being permissive because, in its view, applying Section 17(a)'s plain meaning would be "contrary to what seems so clearly to be the intent of Congress in enacting" Section 17(a). Appendix A at 10a.

To the detriment of both Rock Island employees and Congress' policies in this area, the court of appeals misconstrued the intent of Congress in enacting Section 17's employee protection requirements. While it is correct that the legislative history of Section 17 shows

that Congress intended that section "to make no change in existing law as it affects employee protection" (H. Rpt. No. 96-583, 96th Cong., 1st Sess. at 27 (1979)), there is not a single statement in either congressional reports or debates on the MRRA which mentions the "entire line abandonment" exception. Any attempt to raise such an ambiguous reference in a congressional report into being an implied exception to language which admits of no exception is contrary to the basic canons of statutory construction. *E.g., TVA* v. *Hill*, 437 U.S. 153, 173 (1978); *United Air Lines, Inc.* v. *CAB*, 569 F.2d 640, 647 (D.C. Cir. 1978). Moreover, such an interpretation of legislative intent is also refuted by both the "existing law" on employee protection and subsequent statements by the same Congress while it was considering this very issue in connection with RITA.

Contrary to the court of appeals' citation of pre-1976 court and ICC decisions upholding the "entire line abandonment" exception to employee protection (Appendix A at 11a), the sole support for the assertion that pre-MRRA "existing law" included such an exception are several decisions by the ICC construing the mandatory employee protection language in 49 U.S.C. § 10903(b)(2). *E.g., Wellsville, A.&G.R.—Abandonment*, 354 I.C.C. 247 (1978). Pre-1976 cases are not relevant because it was not until 1976 that Congress amended the Interstate Commerce Act to make employee protection mandatory in abandonment cases. Section 802, Pub. L. No. 94-210, 90 Stat. 31, 127 (1976) (since recodified as 49 U.S.C. § 10903, *et seq.*). Post-1976 ICC decisions, besides being erroneously decided (*see*, RLEA Pet. at 17-19, *Susquehanna, supra*), are inapposite because they did not involve a major carrier such as the Rock Island. In the only

pre-1976 ICC case involving the potential abandonment of an entire rail system of a major railroad, the ICC specifically rejected the assertion in that case that there should be "the wholesale separation from employment [of railroad employees] without adequate compensation . . . ." *Penn Central Transportation Co.—Reorganization,* 347 I.C.C. 45, 92 (1973).

When it concluded that it was ' clear" that Congress intended an implied exception to exist in this case, the court of appeals ignored post-MRRA statements by the same Congress which enacted the MRRA that it viewed its earlier actions in passing the MRRA as having imposed a mandatory employee protection obligation in this case.[18] While Congress was considering legislation which eventually became RITA, the House Committee on Interstate and Foreign Commerce reported out that legislation in March 1980, and stated:

> During the period of directed service, the bankruptcy court, on January 25, 1980, ordered the Rock Island to be liquidated on the grounds it could not be reorganized. As part of the litigation [*sic*] order, *the Rock Island must obtain a certificate of abandonment from the bankruptcy judge with a fair arrangement for employees* at least as protective of the employees as required under section 11347 of Title 49 of the United States Code.

H. Rpt. No. 96-839, 96th Cong., 2d Sess. at 21 (1980) (emphasis added). The committee's statement was

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[18] RLEA acknowledges that subsequent legislative history forms a hazardous basis for devining the intent of Congress, *Andrus* v. *Shell Oil Co.,* 446 U.S. 657, 666 n.8 (1980); however, such information is instructive in a case such as this where it explains the intent of Congress *before* any court inferred that Congress did not intend such a result.

based upon the knowledge that it had earlier in the MRRA required the imposition of employee protection in this case. Moreover, it was premised upon that interpretation of its own intent that Congress enacted the alternative employee protective program of RITA, 45 U.S.C. § 1005. *Compare,* 126 Cong. Rec. S5806 (May 22, 1980) (Remarks of Sen. Kassebaum), *with,* H. Rpt. No. 96-839, *supra,* at 21-23.

By disregarding the instructions of this Court that the plain language of a statute is to be followed, the lower courts have construed Section 17(a) of the MRRA in such a way that the goals which Congress sought to achieve by the enactment of that provision have been frustrated, both for the Rock Island situation and probably for the future. RLEA respectfully submits that, because the decisions below have had such a debilitating impact on Congress' legitimate attempts to regulate commerce and to discourage railroad liquidations, this Court should review this case.

III. By Concluding That 11 U.S.C. § 1170 Permitted The Rock Island Reorganization Court To Authorize An Abandonment Of The Entire Railroad Without First Conducting An Evidentiary Hearing Into The Validity Of Such An Abandonment, The Lower Courts Have Construed A New Statute In A Manner Which Conflicts With Prior Decisions Of This Court

Section 1170 of the Bankruptcy Code, 11 U.S.C. § 1170, provides in two subsections that the reorganization court may authorize an abandonment pursuant to that section only after notice and a hearing. 11 U.S.C. § 1170(a), (c). That hearing requirement is not, petitioner RLEA submits, a mere hortatory provision, but rather, it is a command which seeks both to protect the public interest and to assure that basic due process

guarantees are provided. *Cf, Goldberg* v. *Kelly,* 397 U.S. 254, 267 (1970). Both the reorganization court and the court of appeals concluded, however, that the evidentiary hearing requested by RLEA was unnecessary in this case because of the reorganization court's "total immersion" into the CRI's reorganization (Appendix A at 4a; Appendix B-2 at 27a), and because of the earlier decision that the carrier was unreorganizable. Appendix A at 5a; Appendix B-2 at 27a.

By treating the Rock Island's rights to abandon its entire system as being justified by the prior reorganization proceedings, and as being compelled by the earlier decision to liquidate, the lower courts have deprived the abandonment authorization requirement of any substantive merit; that requirement has become a mere "procedural requirement" (Appendix A at 5a) which is simply a "technical recognition" of what has previously been ordered. Appendix B-2 at 27a. That emasculation of the need for abandonment authority clearly conflicts with prior decisions of this Court which have required such authority before a carrier ceased operations, even in the face of an erosion of the debtor's estate. *E.g., New Haven Inclusion Cases,* 399 U.S. 392, 461 (1970); *Palmer* v. *Massachusetts,* 308 U.S. 79, 87-88 (1939).

This Court has long recognized that the public's interest in continued rail transportation is not to be ignored merely because a railroad enters reorganization under Section 77.[19] Indeed, this Court has consistently held that the protection of the public's in-

[19] The new Bankruptcy Code has not changed this principle for 11 U.S.C. § 1165 infuses the public interest into railroad reorganizations under the Code.

terest in continued rail service is one of the dual objectives of Section 77. *E.g., New Haven Inclusion Cases, supra,* 399 U.S. at 431. While it is correct that a "carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage" (*Brooks-Scanlon Co.* v. *Railroad Commission,* 251 U.S. 396, 399 (1920)), it is also well accepted that the "public interest is not merely a pawn" to be sacrificed to the private interests of the creditors and debtor. *E.g., Penn-Central Merger Cases,* 389 U.S. 486, 511 (1968). As the Seventh Circuit recently summarized in another case involving the Rock Island:

> When the continuation of rail service is essential for the protection of the public interest, the courts have . . . determined that the shareholders' right to realize the value of the property may be held in abeyance for a reasonable period while a solution, acceptable to both the public and private interests, can be devised.

Gibbons v. *United States* [hereinafter, *"Gibbons II"*] 7th Cir. Nos. 79-2413, *et al.,* decided October 7, 1981, slip op. at 20.

The abandonment process is one method by which that solution can be devised, *Palmer* v. *Massachusetts, supra,* and thus, it is clear that a carrier, even a cashless one such as the Rock Island, cannot withdraw its assets from the railroad business until it obtains regulatory approval to abandon its operations. *E.g., New Haven Inclusion Cases, supra,* 399 U.S. at 461; *Gibbons* v. *United States* [hereinafter, *"Gibbons I"*], 660 F.2d 225, 229 (7th Cir. 1981). However, in viewing the purpose to be served by requiring abandonment approval before actually liquidating, it must be borne in mind that Section 77 places the primary responsibility for

devising the solution acceptable to the public upon the ICC under Section 77(d). *Ecker* v. *Western Pac. R.*, 318 U.S. 448, 468 (1943). Moreover, it should also be remembered that unless a line of railroad authorized to be abandoned is sold or leased for continued rail usage, there is no bar to the scrapping of that line. Since Section 77(d) has been bypassed in this case, the abandonment process, with all of its dangers, was the sole mechanism available to the public to assure that rail lines which could be preserved for rail usage were in fact saved.[20]

By denying RLEA the right to challenge the validity of the solution recommended by the ICC, the lower courts have deprived the abandonment authority process of its reason for existing. If, as the courts below have concluded, the abandonment authority is simply a technical recognition of the liquidation order, then there is no justification for holding in abeyance the shareholders' right to realize the value of their property while that procedural formality is being obtained. Indeed, one court has already reached such a conclusion. *In re Auto-Train Corp., supra.* But yet, it is well settled that the abandonment process does hold those rights in abeyance. *Gibbons II, supra; Gibbons I, supra,* 660 F.2d at 229. If that process is to retain its substantive validity under Section 1170 of the Bankruptcy Code, then the hearing requirement must call for an actual evidentiary hearing when an interested party challenges the justification to abandon all rail lines of the debtor, especially those which the ICC has concluded are essential to the communities served by those

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[20] The danger of not examining closely the validity of an abandonment order encompassing lines which are clearly essential to affected communities is evident from this case. *See,* note 4, *supra,* at 6.

lines. The decisions below have substantially jeopardized Congress' intent that the abandonment process retain its integrity under both the MRRA and the Bankruptcy Code.

CONCLUSION

For the reasons set forth herein, Petitioner Railway Labor Executives' Association respectfully requests that a Writ of Certiorari be issued to review and to reverse the Judgment of the Seventh Circuit.

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